Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

JOHN GARY BYERLY, JR.,

Petitioner

versus

THE STATE OF OHIO,

Respondent

Petition For A Writ of Certiorari
To The Court of Appeals for
the Eleventh District of Ohio

PETITION FOR WRIT OF CERTIORARI

With Appendix

Michael A. Lamson
Counsel of Record
Paul C. Looney
Clay S. Conrad
Lamson & Looney, P.C.
11767 Katy Freeway, Suite 740
Houston, TX 77079
Tel: (281) 597-8818

53pp

QUESTIONS PRESENTED FOR REVIEW

I

Under what circumstances does a private citizen become an "agent or instrumentality" of the police, for purposes of Fourth Amendment search and seizure analysis?

I I

When the police assist a private citizen in the commission of a crime, with the intentions of using the fruits of that crime to justify a warrantless search, does the private citizen become an agent or instrumentality of the police for purposes of Fourth Amendment search and seizure analysis?

I I I

When a private citizen illegally enters the home of another with the active encouragement, assistance and acquiescence of the police, do they become an agent or instrumentality of the police, subject to the same constitutional restraints as the police themselves?

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PETITION FOR A WRIT OF CERTIORARI

John Gary Byerly, Jr., respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Eleventh District of Ohio in this case.

STATEMENT OF JURISDICTION

The Court of Appeals for the Eleventh District of Ohio entered its judgment on August 24, 1998. An Application for Reconsideration was filed on September 4, 1998 and was denied on September 18, 1998. (App.C) A Memorandum of Jurisdiction was timely filed with the Supreme Court of Ohio on October 7, 1998. The Memorandum of Jurisdiction was denied by the Supreme Court of Ohio on January 20, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257.

OPINIONS BELOW

The opinion below in the Court of Appeals for the Eleventh District of Ohio on direct appeal is unreported (App. B). The order denying jurisdiction in the Supreme Court of Ohio, decided January 20, 1999, is unreported. (App. A).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

This case arises from the murder conviction of the Petitioner, charged with the death of his wife following an altercation occurring in their home during the early morning hours of October 27, 1996. Petitioner was convicted following a bench trial March 7, 1997, by Judge Enlow of the Portage County Court of Common Pleas, Ravenna, Ohio. Defense counsel did not file a Motion to Suppress the fruits of a warrantless entry and search of Petitioner's house. Petitioner urged as Point One on appeal that failing to file a Motion to Suppress was ineffective assistance of counsel under the Sixth Amendment, because reasonable counsel would have recognized a "reasonable possibility" such a motion could have been granted, sufficient to warrant a reversal under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 67 (1984) and the Ohio standard of *State v. Garrett*, 76 Ohio App.3d 57 (1991). The Court of Appeals for the Eleventh District of Ohio affirmed on the basis that there was no reasonable possibility such a Motion to Suppress would have been granted, because the police reasonably believed an emergency existed.

Preceding the search of the residence, the victim's mother, Donna Stough, arrived on the scene and attempted to gain entry to the residence along with the police. She asked the police if they could just kick down the door to the house to gain entry. When asked if she lived at or owned the house, she informed the police that she did not; i.e., she had no authority to enter or consent to an entry of the house. In spite of this, the police located an unlocked window, tested it to ensure it would open and pointed the window out to her. The police then stood by and allowed her to open the window and enter the home, at approximately 1:45 A.M., October 27, 1996. After Ms. Stough entered the Byerly residence, the police pounded the front door of

the home instructing her to open it for them. The police entered through the door and followed Ms. Stough up the stairs, where the injured Mrs. Byerly was found.

The court below relied on the fact that police did not enter the residence until Ms. Stough had crawled through a window, writing that she had possibly placed herself in danger and that her entry into the home created sufficient emergency circumstances to justify a warrantless entry. Petitioner urged during the appeal that the victim's mother, in entering the house with the active encouragement, assistance and acquiescence of the police, became the agent of the police and was subject to the same constitutional restraints as the police themselves.

The court below additionally found that the Petitioner had waived his Fourth Amendment rights by committing a violent crime. The question raised was whether the Police had evidence of exigent circumstances or probable cause sufficient to warrant a nighttime entry into a private residence. The Court ruled that a man cannot murder his wife and retain a Fourth Amendment right to privacy, merely because he did so quietly.

An Application for Reconsideration was filed on September 4, 1998, and denied on September 18, 1998. A Memorandum of Jurisdiction was timely filed with the Supreme Court of Ohio. However, that Court refused to hear the case, denying jurisdiction on January 20, 1999. This Petition for Certiorari follows.

REASONS FOR GRANTING THE PETITION

A. A Conflict in the Circuits Exists as to When a Private Citizen Becomes an Agent or Instrumentality of the Government for Purposes of Fourth Amendment Analysis

B. When Police Assist an Individual in Illegally Entering the Residence of Another, with the Intention of Using the Fruits of That Entry to Justify a Warrantless Search, the Individual Involved Becomes an Agent of the Police

C. Police May Not Assist a Civilian to Illegally Enter the Residence of Another, and Then Use the Civilian's Presence in the Residence to Justify an Emergency Warrantless Entry

The court below clearly erred in failing to find that Donna Stough became an agent of the police in the instant cause. They failed to properly apply the Kansas test they themselves adopted from *State v. Bohannon*, 596 P.2d 190, 195 (Kan. App. 1979): 1) whether the search was made under the authority or direction of the police, 2) whether the citizen was actively recruited by the police, 3) whether the citizen was paid to conduct the search, 4) whether the police instigated, influenced, or arranged for the individual to make the search, 5) whether the police encouraged or participated in the search, or 6) whether the police provided transportation, chose the time for the search, or described the items to be seized. Moreover, the court below inexplicably failed to include the "preknowledge or acquiescence" test from *Bohannon*, which could have been written with this case in mind:

> It is only when government has preknowledge of and acquiesces in a private party's conducting a search and seizure which the government itself could not have undertaken that the problem of compliance with Fourth

Amendment standards arises from search by a private party. *Id.*, quoting *State v. Hruska*, 547 P.2d 732 (Kan. 1976). Because compromising entanglements between a private citizen and the police may arise in a variety of circumstances, the *Bohannon* test is not a balancing test: if the "preknowledge and acquiescence" test along with any of the six enumerated factors are met, the individual searching becomes an agent of the police.

The Petitioner believes the *Bohannon* test represents a clear and concise explication of the circumstances under which a private citizen becomes an agent of the police. However, whether this Honorable Court adopts the *Bohannon* test or a test of its own devise, it is clear that this Court, and no other, must annunciate the standards involved to gauge when a private citizen acts as an agent of the police. Such situations are common, and present a clear danger of both unconstitutional police activities and an untenable risk to civilians.

Various Federal courts have adopted widely different tests to determine when a private individual becomes an agent of the police. These various tests demonstrate a conflict in the circuits which this Honorable Court, and no other, can address. One such test would be that adopted by the Ninth Circuit in *United States v. Miller*, 688 F.2d 652, 657 (9th Cir.1982): (1) whether the Government knew or acquiesced in the intrusive conduct; and (2) whether the private party intended to assist law enforcement efforts or to further his own ends. The Seventh Circuit considers the factors in the Ninth Circuit test, but also asks whether the private actor performed the search at the request of the government and whether the government offered a reward. *United States v. Feffer*, 831 F.2d 734, 738-40 (7th Cir.1987). In *United States v. Smythe*, 84 F.3d 1240, 1243 (10th Cir.1996), the Tenth Circuit required that the government must "affirmatively encourage or instigate the private action" for the private actor to

be considered an agent of the police. This is to be determined by "the totality of the circumstances." The First Circuit, perhaps sensing the discrepancies created between the tests other circuits have adopted, has written:

> . . . any specific "standard" or "test" is likely to be oversimplified or too general to be of help, and that all of the factors mentioned by the other circuits may be pertinent in different circumstances: the extent of the government's role in instigating or participating in the search, its intent and the degree of control it exercises over the search and the private party, and the extent to which the private party aims primarily to help the government or to serve its own interests.

United States v. Pervaz, 118 F.3d 1, 6 (1st Cir. 1997). The Petitioner would urge that the *Bohannon* test is the most well thought-out of those cited, as it encompasses the most complete range of the many possible methods by which a private citizen may be used as an agent or instrumentality of the police. Further, the threshold test of "preknowledge and acquiescence," combined with any of the other six enumerated factors, prevents the *Bohannon* test from being applied over broadly. Whatever test is adopted by this Honorable Court, however, it is plain that this Court, and no other, must spell out this test for purposes of Fourth Amendment analysis, in order to provide both consistency and justice in the application of the law.

In this case, several *Bohannon* factors are met, and Ms. Stough was therefore acting as an agent of the police, under the test the court below adopted. Factor one, whether the search was made under the authority or direction of the police, is met because the entry into the Byerly residence was made under the authority of the police. The job of the police is to prevent and detect crime, not assist in its commission. Herein, the police permitted and

encouraged a civilian to illegally enter a private residence under their watch. They assisted by locating an unlocked window, and testing the window to ensure it would open. The police authorized this search: if they had not so authorized it, Ms. Stough should have been arrested for breaking and entering.

Factor four, whether the police instigated, influenced, or arranged for the individual to make the search, was met when the Police assisted Ms. Stough in locating and testing the window. The fifth factor, whether the police encouraged or participated in the search, is met in that the police encouraged Ms. Stough and participated in her entering the residence, and ordered Ms. Stough to unlock the door as soon as she was in the house, which was prior to any evidence being discovered.

The police knew that Donna Stough was about to climb in the window; they helped locate the window for her and tested it to ensure it would open. They acquiesced in her illegally entering the Byerly residence in this manner. Her entry was made with the awareness, encouragement, assistance and acquiescence of the police. Under the very test the court below adopted, Ms. Stough was an agent of the police.

The court below claimed "The commanding officer did not assist Donna; she opened the window herself." This assumes the only way in which the police could have assisted Ms. Stough would be by opening the window for her or lifting her bodily through the window. This overlooks the fact that the police assisted Ms. Stough by locating the unlocked window and pointing it out to her, and testing it to ensure it would open. This active assistance by the police is more than sufficient to meet the *Bohannon* test under the factors mentioned above.

Moreover, that some of the *Bohannon* factors may not be established is not dispositive: no single factor is necessary. If any

factor is met, the private actor becomes an agent of the police. Several of the factors have been met by the instant case.

The instant case is similar to *Stapleton v. Superior Court*, 447 P.2d 967 (Cal. 1968). In *Stapleton*, an agent for a credit card company accompanied the police to a suspect's house to arrest him. He noticed the suspect's car on the street and searched it of his own volition, turning the evidence over to police. The California court ruled that such evidence must be excluded in light of police perception of the illegal search, which consisted of standing by silently observing the search take place, although the police did nothing to aid in the search. Here, the police not only stood by silently as Donna Stough entered the Byerly residence, they helped her locate an open window. As soon as she was inside, the police ordered her to open the door to let them in. If the complicity between police and the private citizen was excessive in *Stapleton*, it was much more so in the instant cause. The discrepant results between *Stapleton* and the instant cause dramatically highlight the need for this Honorable Court to create a rule defining when private citizens must be considered agents of the police for Fourth Amendment purposes.

Herein, the court below clearly erred in stating that Donna Stough's was not acting as an agent of the police when she entered the Byerly residence through a window under the watchful eye of the officers at the scene. The officers here cannot be characterized as willing but innocent beneficiaries who stood silently by. *Moody v. United States*, 163 A.2d 337, 340 (D.C. 1960). They assisted, encouraged and acquiesced in Ms. Stough's entry into the Byerly residence, and they exploited her entry in order to themselves gain entry into the home.

Ms. Stough's presence in the residence does not add to the totality of the circumstances in any way whatsoever, as the court below erroneously believed, because she had no right to be in the

residence and only entered with the acquiescence of the police. The idea that her presence in the home could be used to justify a search would make a mockery out of the Fourth Amendment: if a private citizen, acting with the assistance, preknowledge and acquiescence of the police, could illegally enter a home and by their presence in the home justify the entry of the police, there would be no protection against illegal home invasions at all.

Clearly, after encouraging and assisting Ms. Stough to enter the Byerly residence through a window, the police could not rely on her presence to add to the exigencies of the situation. It is well established that a warrantless search by law enforcement authorities, even if based upon probable cause, cannot be justified by exigent circumstances that they willfully participated in creating. *United States v. Timberlake*, 896 F.2d 592, 597 (D.C. Cir. 1990), quoting *United States v. Socey*; 846 F.2d 1439, 1448 (D.C. Cir. 1988); *United States v. Curzi*, 867 F.2d 36, 41-43 (1st Cir. 1989); *United States v. Munoz-Guerra*, 788 F.2d 295, 298 (5th Cir. 1986); *United States v. Buchanan*, 904 F.2d 349, 355 (6th Cir. 1990); *United States v. Duchi*, 906 F.2d 1278, 1284 (8th Cir. 1990); *United States v. Tobin*, 890 F.2d 319, 332 (11th Cir. 1989); *Ohio v. Jenkins*, 104 Ohio App.3d 265, 271, 661 N.E.2d 806, 810 (Ohio App. 1 Dist. 1995). The officers encouraged, assisted and participated in Donna Stough's entry of the Byerly residence. They may not by their own actions willfully create the exigent circumstances relied upon to justify their entry.

Unquestionably, the entry of Ms. Stough into the Byerly residence was driven by emotion. Unquestionably, the police were anxious to enter the house along with Ms. Stough. Ms. Stough was not ordered or commanded to enter the Byerly home by the police, nor was she brought to the house by the police. However, when the police allowed and assisted Ms. Stough in illegally entering the Byerly home in the middle of the night, with

the intent of having her unlock the door to allow them to enter, Ms. Stough became an agent of the police. This conclusion is mandated by common sense, the Constitution of the United States, and the *Bohannon* test which the court below employed.

Police may not be permitted to evade the reach of the Fourth Amendment by assisting citizens to enter where the police are forbidden to go. Such actions would in many cases not only risk putting untrained, unarmed civilians in harms way, it would also risk the destruction or corruption of valuable evidence by untrained amateurs ill-prepared to deal with sensitive crime scenes. Neither result is one which makes good public policy.

The court below, in refusing to find that Ms. Stough was acting as an agent of the police, clearly violated any reasonable standard that could be adopted as to when a private citizen does become an agent of the police. Since this Honorable Court has not yet adopted a standard to decide this issue by, the Ohio court adopted *partially* the Kansas test from *Bohannon* - and failed to apply it properly. Clearly, the need exists for this Honorable Court, and no other, to determine when and how a private citizen may become an agent of the police within the meaning of the Fourth Amendment. This issue is well presented by the instant case, and should be taken up at this time.

D. The Rights of an Individual in His Home Against Unreasonable Searches and Seizures Are Not Limited by His Criminal Actions, Unless the Police Possess Probable Cause to Believe Those Criminal Actions Have Occurred

The Court of Appeals for the Eleventh District of Ohio wrote that the exclusionary rule did not apply in the instant case, because "a man cannot beat or strangle his wife and maintain an absolute Fourth Amendment right merely because he did so quietly." This statement of the Court of Appeals for the Eleventh

District of Ohio egregiously minimizes the import of the Fourth Amendment, and contradicts the law.

It is undoubtedly true that the commission of a crime, committed quietly and unbeknownst to police officers, does not waive any Fourth Amendment rights. The question, which the Court of Appeals for the Eleventh District of Ohio has not properly addressed, was whether the police had reliable evidence indicating exigent circumstances and probable cause to enter a quiet residence in the middle of the night?

The answer is resoundingly no. The evidence available to the police at the time they entered the Byerly residence consisted of a series of non-emergency telephone calls from the same party conveying identical information, the fact that both the residents cars were at the home, and that neither of the Byerly's came downstairs to answer the door. These factors, even considered in the aggregate, are simply not sufficient to justify a warrantless entry by the police into a private home in the middle of the night.

That nobody came downstairs to answer the door in response to the knocking of the police is legally irrelevant. The Petitioner was under no duty to answer the door. The police cannot use the refusal of a person to answer the door as justification for entering that person's residence without a warrant - otherwise, they could enter any occupied home, at any time, either with consent or on the grounds that the homeowner refused to open his door.

The Court of Appeals for the Eleventh District of Ohio also asserts that the police saw a large male in an upstairs window. However, the presence of the Petitioner in his own home was hardly cause for suspicion. A citizen is free to be seen in the windows of his or her home without giving the police justification to make a warrantless entry. The police had no reason to doubt the Petitioner was home, fully expected the Petitioner to be home,

and had no just cause to be alarmed at his presence.

The fact that Donna Stough entered the house through an unlocked window, with the active assistance, preknowledge and acquiescence of the police, does not add to the exigent circumstances. There was no indication she was in any danger, and the police had encouraged her to enter the house in any event.

The linchpin of the issue is whether the police had 1) probable cause to believe a crime had been committed or that evidence would be located, and 2) reasonable grounds to believe an emergency existed. The only relevant information the police had in this instance was a series of second-hand phone calls from a person Ivy Byerly and the fact that the Byerly's cars were at home at a quarter to two in the morning. It is simply not feasible that a quiet house at that hour of the morning, with the residents' cars parked outside, could have raised a reasonable police officers' suspicions to the level of an emergency situation. Therefore, reasonable counsel should have filed a Motion to Suppress, and counsel in this cause were ineffective under the Sixth Amendment, *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 67 (1984) for failing to have done so.

E. Failure to File a Motion to Suppress the Results of the Initial Entry of the Police into the Byerly Residence Was Clearly Ineffective Assistance of Counsel

There was never any Motion to Suppress filed in this cause, in spite of the clear fact that the police entry into the Byerly residence was made without a warrant and without sufficient exigent circumstances (or other exception to the exclusionary rule) known to the officers to justify warrantless entries. The Fourth Amendment proscribes any sort of illegal entry, including any entry consented to by a person the police do not reasonably believe has authority over the premises sufficient to empower

them to consent to a search. *Illinois v. Rodriguez*, 497 U.S. 177, 192, 110 S.Ct. 2793, 2803, 111 L.Ed.2d 148 (1990). The appropriate remedy, when law enforcement officials have illegally entered and searched a residence, is the exclusion of any evidence so obtained. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961).

In the instant cause, the Court of Appeals for the Eleventh District of Ohio held that trial counsel was not ineffective for failing to file a Motion to Suppress, because there was no "reasonable probability" such a motion would have been granted. This was clearly erroneous under the facts of this case. The exception the Ohio court relied on in ruling that there was no reasonable likelihood for a motion to suppress to be granted was the "exigent circumstances" rule, citing *Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed. 290 (1978). However, as the court below premised their opinion on a finding that Ms. Stough was not acting as an agent of the police, and as that finding was premised on an incorrect legal standard, this cause should be remanded to the court below for a determination of whether the police had sufficient exigent circumstances available to them to violate the sanctity of the Byerly home at the time they assisted Ms. Stough in entering the house.

It is plain that failure to file a Motion to Suppress in an appropriate case can constitute ineffective assistance of counsel. In *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), this Honorable Court made it clear that failing to file a Motion to Suppress could constitute ineffective assistance of counsel where such a motion would have a reasonable likelihood of success, and where the evidence admitted in absence of such a motion may have contributed to the verdict. In the instant case, the likelihood that such a motion would have been granted at trial is great, and the prejudice to the

Petitioner was manifest.

It is clear, that there is a reasonable probability that, but for counsel's unprofessional failure to file a Motion to Suppress under the facts of this case, the result of the proceeding would have been different when considering the totality of the evidence that was before the court. This case clearly meets the standard for harm which was set out by the this Honorable Court in *Strickland v. Washington*, and must be reversed for that reason.

* * *

In sum, the decision of the court below presents a clear case of ineffectiveness of counsel, which was evaded by allowing the police to use a private citizen as a foil for their own inability to legally enter a private residence, to fabricate their own exigent circumstances in violation of clear rules of law, and to ignore the dictates of the Fourth Amendment premised solely on what was later found in the home. This case also reveals a split in authority on what is necessary to make a private citizen an agent or instrumentality of the police. Only this Court can resolves this split in authority, and set the necessary standards by which it can be determined when a private citizen becomes an agent of the police. That done, it will be clear that the court below erred in ruling that there was no reasonable probability that a Motion to Suppress would have succeeded under the facts of this case.

CONCLUSION

The Petition for a Writ of Certiorari should be granted for the reasons discussed above.

Respectfully Submitted,

By:_____

Michael A. Lamson

Counsel of Record
Paul C. Looney
Clay S. Conrad
Lamson & Looney, P.C.
11767 Katy Freeway, Ste. 740
Houston, TX 77079
Tel. (281) 597-8818

APPENDIX

APPENDIX A

ORDER DENYING JURISDICTION

SUPREME COURT OF OHIO

JANUARY 20, 1999

The Supreme Court of Ohio

State of Ohio,	:	1999 TERM
Appellee	:	
v.	:	Case No. 98-2050
John G. Byerly, Jr.,	:	ENTRY
Appellant.	:	

Upon consideration of the jurisdictional memorandum filed in this case, the Court denies leave to appeal.

Upon consideration of the motion for admission pro hac vice of Paul C. Looney,

IT IS ORDERED by the Court that the motion for admission pro hac vice be, and hereby is, denied as moot.

COSTS:

Docket Fee, $40.00, paid by Paul C. Looney & Associates.

(Portage County Court of Appeals, No. 97P0034)

-s-

Thomas G. Moyer
Chief Justice

APPENDIX B

COURT OF APPEALS
ELEVENTH DISTRICT
PORTAGE COUNTY, OHIO

JUDGES

STATE OF OHIO,

Plaintiff-Appellee,

HON. DONALD R. FORD, P.J.,
HON. ROBERT A. NADER, J.,
HON. WILLIAM M. O'NEILL, J.

- vs -

JOHN G. BYERLY, JR.,

Defendant-Appellant

CASE NO. 97-P-0034

OPINION

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas Case No. 96 CR 0254

JUDGMENT: Affirmed

VICTOR V. VIGLUICCI
PORTAGE COUNTY
PROSECUTOR

MARRETT W. HANNA
ASSISTANT
PROSECUTOR
446 South Chestnut Street
Ravenna, OH 44266

(For Plaintiff-Appellee)

ATTY. PAUL C. LOONEY
11767 Katy Freeway, #740
Houston, TX 77079

ATTY. KEVIN W. DUNN
72 Public Square
Medina, OH 44256

(For Defendant-Appellant)

NADER, J.

After a bench trial, the Portage County Court of Common Pleas found appellant, John Byerly, guilty of murder and sentenced him to fifteen years to life in prison. Appellant now seeks to have his conviction reversed, asserting the following as error:

> "[1.] The appellant was denied effective assistance of counsel pursuant to Article 1, Section 10 of the United States and Ohio Constitutions [*sic*] via the acts and omissions of his trial attorneys.
>
> "[2.] The trial court erred in not modifying its findings and/or granting appellant a new trial pursuant to Criminal Rule 33."

We will address the second assignment first.

At the close of the state's case, appellant moved for a judgment of acquittal under Crim.R. 29(A), arguing the evidence was insufficient to permit the judge, as the trier of fact, to reach a valid conclusion of appellant's guilt beyond a reasonable doubt. That motion was overruled. Appellant renewed his motion at the close of all evidence, but, again, it was overruled. After the court pronounced the verdict finding appellant guilty of murder, appellant filed a motion under R.C. 2945.79(A) and (D) for a new trial and/or for a modification of the guilty verdict to a finding that appellant was guilty of a lesser included offense. In this motion, appellant argued the evidence was insufficient to sustain the murder verdict. The trial court overruled this post-trial motion in the sentencing entry. The second assignment of error challenges the denial of the post-trial motion for a new trial or a reduction in the verdict, but on appeal, appellant cites and argues his case under Crim.R. 33(A)(4). For his remedy he asks in the appellant's brief that we reverse his conviction and remand the

cause with instructions, presumably to conduct a new trial or to reduce the verdict.

Crim.R. 33 states, in pertinent part:

> "(A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:
>
> ***
>
> "(4) That the verdict is not sustained by sufficient evidence or is contrary to law. ***."

This rule was enacted in 1973 at a time when it could fairly be argued that an appellate court had the power to order a new trial if it found the conviction was not sustained by sufficient evidence. See *Bryan v. United States* (1950), 338 U.S. 552; *Sapir v. United States* (1955), 348 U.S. 373; *Yates v. United States* (1957), 354 U.S. *298; Forman v. United States* (1960), 361 U.S. 416.

However, the law in this area changed in 1978. In *Burks v. United States* (1978), 437 U.S. 1, the appellate court held that the government did not adequately rebut the defendant's evidence in support of his insanity defense and reversed his conviction for bank robbery. The court remanded the cause to the district court with instructions to determine whether a judgment of acquittal should be entered or whether the defendant should be tried again. The Supreme Court granted certiorari on the question whether the defendant could be retried consistently with the Double Jeopardy Clause.

The Supreme Court accepted the defendant's characterization of the appellate court's ruling as holding the evidence was insufficient as a matter of law to sustain the conviction. *Id.* at 10-11. The Court then departed from the *Bryan-Forman* line of

cases, cited above, and held that when a federal appellate court reverses a conviction on the ground that the evidence is insufficient to sustain it, the *only* recourse available is for the appellate court to enter a judgment of acquittal, because retrial would be barred by double jeopardy. Id. at 16-17. Also, the Court found it irrelevant that the defendant requested a new trial, reasoning that it could not meaningfully be said the defendant waived his right to a judgment of acquittal by so moving. *Id.* at 17.

In *Greene v. Massey* (1978), 437 U.S. 19, the Court applied the same analysis to a state conviction, holding that a state appellate court cannot order that a defendant be retried after holding his original conviction was not supported by sufficient evidence.

Crim.R. 33(A)(4) has not kept pace with the changes in constitutional law. It purports to give the trial court, and, by extension, this court, the authority to order a new trial if the evidence is insufficient to sustain appellant's conviction. That is impossible. Even though appellant has requested a new trial, if we agree that the evidence presented here is insufficient, the only remedy available to us under *Burks* and *Massey,* would be to enter a judgment of acquittal.

Appellant's third motion challenging the sufficiency of the evidence and requesting a new trial was void. However, in fairness, we will address the substance of appellant's sufficiency arguments as if he appealed the judge's denial of his trial motion for acquittal pursuant to Civ.R. 29(A).

When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court's function is extremely limited. When the state has produced at least a modicum of evidence on each of the essential elements of the crime, the

question on appeal is not whether we think the accused is innocent of the charge. Instead the question is whether the quantum of evidence produced by the state, when viewed in a light most favorable to the prosecution, is sufficient to allow any rational trier of fact to draw the conclusion that the accused is guilty beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 319. We are not to inquire into the weight, or persuasiveness, of the evidence presented, for that is within the purview of the trier of fact. Therefore, a motion for acquittal should only be granted in those exceptional cases where reasonable minds *must* have reasonable doubt as to the defendant's guilt. *State v. Apanovich* (1987), 33 Ohio St.3d 19, 23. In other words, the motion should be granted where there is no need for formal deliberation on the evidence because a verdict of acquittal is, or should have been, a foregone conclusion. See *State v. York* (May 1, 1998), Lake App. No. 97-L-037, unreported.

Sharon Heaton, a co-worker of appellant's wife, Ivy Byerly, testified that the Byerlies threw a Halloween party on the night of October 26, 1996. At one point, Ms. Heaton asked to use the bathroom and Ivy escorted her to the second floor of the house. Ms. Heaton said appellant came up the stairs, angrily asking why Ivy was not helping him with a bonfire in the back yard. After Ivy explained she was only showing Ms. Heaton the way to the bathroom and would be out in a minute, Ms. Heaton saw appellant slap Ivy across her face. Ivy held Ms. Heaton's elbow in such a way that Ms. Heaton took it as a plea not to interfere or to speak about the incident.

Ms. Heaton and two other witnesses, Michael and Melissa Hartman, testified that they gathered with Ivy in the front yard when the party began to wind down, at approximately 11:30 p.m. Melissa Hartman testified that she saw appellant "slamming"

expensive stereo speakers while cleaning up after the party and that he seemed to be in a bad mood. All three witnesses testified that they were concerned for Ivy's welfare, and that Ms. Hartman asked Ivy and her two children, Garrett, aged three, and Meaghan, aged 18 months, to spend the night at the Hartman residence. Ivy declined the invitation, stating that appellant would not "try anything" while appellant's two younger sisters were there. They were scheduled to spend the night.

Just then, appellant came out herding his two sisters into a car. Melissa Hartman testified she heard one of the sisters say it was appellant's idea to take them home. After appellant drove them away, Ms. Hartman repeated her invitation for her and the children to spend the night in the Hartman residence. Ivy again declined, stating she wanted to talk with appellant and that it would be better if they were alone.

Melissa Hartman testified that, after she got home, she twice called Ivy to check on her welfare. During the second call, Ivy reported that she had a talk with appellant, telling him she was unhappy in the marriage, and that she would leave him in the morning. Ivy said appellant was ambivalent about her leaving.

Ms. Hartman testified that, a few minutes later, Ivy called her. Ivy was crying and told her that appellant hit her and that she was bleeding. Melissa told her to leave the house. Ivy declined because appellant was "downstairs or somewhere" and Ivy was afraid to try and get past him, and because Meaghan had already fallen asleep. Ivy told Melissa she planned to take the two children and spend the night in the second-floor bathroom and leave in the morning. Melissa testified that this did not sound like a rational plan, and urged her to call the police. Ivy refused Melissa's suggestion, stating she only wanted to talk to her and then hide out in the bathroom. Melissa said if Ivy were not going to call the police, Melissa would, but that she did not know Ivy's

street address. After some cajoling, Ivy gave Melissa the address and did not further resist the idea that Melissa would be calling the police. Melissa then heard Garrett crying in the background and Ivy told her quickly that she had to go and would call her right back. Melissa asked her why she had to go and if it was because appellant was coming. Ivy did not respond, saying only that she would call back.

When Ivy did not call back, Melissa became concerned. She called the Portage County Sheriffs Department three times and requested that the dispatcher send officers to the Byerly residence to check on Ivy. Melissa also called Donna Cornelius, Ivy's mother, and told her the situation. Donna and her soon-to-be husband, Bill, got dressed and headed over to Ivy's house.

When they arrived, three officers were already at the scene. They had been rapping on the doors but got no response. Donna Cornelius testified that she and Bill identified the two cars belonging to appellant and Ivy, so they surmised the couple was still home. Someone found a ring of keys in the bed liner of appellant's pick-up truck, and as one of the officers tried the keys in the door, the officer assigned to watch the rear of the house called out that he saw a "large male" on the second floor. Appellant was six feet, five inches tall and weighed 227 pounds. The officer testified that he shined a flashlight on this individual, but that the individual did not respond to his calls to come down and open the door. Donna asked one of the officers in the front to break down the door, but the officer refused, indicating this was not Donna's house and that she could not give that permission. Bill Cornelius suggested they try a front window. The commanding officer on the scene tried one of the windows adjacent to the porch, found it to be unlocked, but did not open it. Donna Cornelius opened the unlocked window and crawled inside. She dashed for the stairs, calling out Ivy's name. Bill and

the other two officers on the porch called for Donna to come back and open the door. She did, and the four entered the house together.

They ran upstairs and found Ivy lying unconscious on the floor of a bedroom. Her two children were nestled on either side of her. She had bruises on her face, red marks on her throat, and breathed with great difficulty. The commanding officer asked appellant what happened to Ivy and he responded that he did not know, that he was sleeping.

The paramedic, who tended to Ivy that night, testified that her windpipe was misshapen, being rectangular instead of ovate, which is normal. He had to use a special shunt to insert an oxygen tube.

Ivy was flown to Cleveland Metro Health Center. Dr. Anthony Ripepi, a fourth year surgical intern in the trauma department at Cleveland Metro, testified that he was on duty the night Ivy was admitted and that he was a member of her trauma team. Dr. Repepi said they had to resuscitate Ivy once while she was in the trauma bay and that she was transferred to the intensive care unit. Someone had ordered that a CAT scan be conducted, and Dr. Repepi testified that the scan showed signs of severe brain injuries. Also, they conducted a blood perfusion scan, which indicated there was absolutely no blood flow to Ivy's brain when she was admitted. Dr. Repepi opined that Ivy was brain-dead. X-rays taken at Cleveland Metro also disclosed a fracture through the surgical neck of Ivy's right humerus.

Dr. William Fallon, the Director of the Trauma Department at Cleveland Metro, testified that, although he did not remember physically examining Ivy, he reviewed her charts and test results and confirmed Dr. Repepi's diagnosis that Ivy was brain-dead. Dr. Fallon testified in depth about the internal injuries to Ivy's

brain shown in the CAT scan. Basically, her brain swelled to such an extent that her skull could not contain it. Her brain tissue herniated through the opening in the base of her skull where her spinal column enters. This condition is nearly always fatal.

The source of the swelling was the subject of intense debate at trial. Dr. Fallon noticed a small hematoma on the left side of Ivy's brain that he thought was caused by a blunt-force impact. However, the massive amount of swelling on the right side of her brain seemed out of proportion to the tiny amount of blood pooling on the left side of her brain. That much swelling in light of a very small hematoma led him to conclude that the swelling was probably not caused by the blunt force trauma that caused the hematoma, but that the swelling was probably due to the lack of oxygen in her brain. Dr. Fallon testified that when the oxygen supply to the brain is restricted, the brain cells swell as a result. He said this amount of brain swelling could have resulted from three to five minutes of complete oxygen deprivation. Dr. Fallon admitted that he was not a forensic pathologist, and he could not say what caused the oxygen supply to Ivy's brain to be impaired. He said he would have to defer to the findings of the coroner for that.

Dr. Repepi, on the other hand, was not so deferential. Although he also admitted he was not a forensic pathologist, he stated in response to defense questioning on cross-examination that he had absolutely no doubt that the bulk of Ivy's brain injuries were caused by strangulation. His opinion on this point was very firm. This is why he wrote on Ivy's death certificate that his clinical suspicion of the cause of death was strangulation.

Ivy was pronounced dead the day after she was brought to the hospital.

Prosecutors introduced the coroner's verdict into evidence,

which listed the cause of death as: "Multiple blunt impacts to head, trunk and extremities with left subdural hematoma and lacerations and contusions of brain. Strangulation with anoxic encephalopathy.

Dr. Stanley Seligman, the assistant coroner who actually performed the autopsy, testified that Ivy had a number of bruises on her face and body which he thought were caused by hand slaps.

As to the comminuted fracture of her right humerus, Dr. Seligman said he would not expect a young female to have broken her arm in that manner by simply falling. In Dr. Seligman's opinion, it would have taken a tremendous amount of force to break Ivy's arm in that manner.

Dr. Seligman testified that the blunt-force trauma to the left side of Ivy's head causing the hematoma contributed substantially to the swelling in the right hemisphere of her brain that ultimately caused her death. Lack of oxygen to the brain also contributed to the swelling, but Dr. Seligman could not say which was the predominant factor.

In Dr. Seligman's opinion, the lack of oxygen was probably caused by strangulation.

On this evidence, the state rested.

When viewed in a light most favorable to the prosecution, the evidence paints a picture of escalating domestic violence. A reasonable person could infer from the evidence presented that appellant began the evening by slapping Ivy once for some minor violation of his house rules; that appellant drove his sisters home so that he could continue to beat Ivy in private; that Ivy had had enough of this kind of treatment and told appellant she wanted to end their marriage; that appellant became angry and slapped her

again, harder this time--hard enough to cause her to bleed; that, after a pause (during which Ivy called Melissa), appellant resumed beating Ivy, slapping her repeatedly; that appellant, being a much larger person, desired to cause her more serious harm by throwing her around the room; that appellant broke Ivy's arm and injured her head while throwing her about; and, that appellant finally strangled her, probably while she was already unconscious from the impacts to her head. In this scenario, a reasonable person could conclude that appellant intended to kill Ivy when he wrapped his hands (or a make-shift garrotte of some kind) around her throat. A combination of appellant's actions caused Ivy's brain to swell and to herniate through the opening at the base of the skull, which ultimately caused her death.

For his defense, appellant put on evidence that put some of these elements of the prosecution's story into controversy. He took the witness stand and denied slapping Ivy at the party, as Sharon Heaton claimed. He called one of his little sisters, who testified that it was her idea to have appellant take them home. He claimed he was not angry with Ivy when she told him she wanted to end their marriage and leave him in the morning. Dr. Seligman admitted on cross-examination that the bruises on Ivy's face could have come from a fall. Also, Dr. Seligman stated that the condition of the tissues in Ivy's neck were consistent with a blow; and that a blow to the neck could have caused her larynx or carotid arteries to spasm, thereby restricting oxygen flow to her brain. Also, the injuries to Ivy's neck were not quite consistent with sustained or prolonged strangulation.

Appellant claimed all along that he and Ivy were having a fight. He admitted be struck her once before she called Melissa Hartman. He said he did this because she became physically abusive with him, and he struck out to make her stop. He also admitted striking Ivy a second time after she called Melissa

Hartman. He claimed Ivy attacked him again on the second floor of the house, and that he "shoved" her to make her stop. He surmised that he may have hit her throat by accident. After she fell onto the landing at the top of the stairs, appellant said he saw her try to get up. He then went into a bedroom and heard Ivy fall down the stairs. He denied that he ever intended to kill his wife.

On appeal, appellant argues that his story is consistent with the facts and that the state cannot prove he intended to commit murder save through the use of circumstantial evidence. He cites *State v. Kulig* (1974), 37 Ohio St.2d 157, for the proposition that circumstantial evidence used to establish an essential element of the crime must be irreconcilable with any reasonable theory of innocence to be sufficient to support a finding of guilt. However, *Kulig* was overruled in *State v. Jenks* (1991), 61 Ohio St.3d 259.

After considerable deliberation, we cannot hold that it was impossible for a reasonable person to find appellant intended to commit murder.

This case is distinguishable from *State v. York, supra,* where the state presented evidence that a starved pony was found in a barn on the defendant's property. We held, essentially, that the evidence was just barely sufficient to create a jury question whether the defendant recklessly endangered the health of the pony. However, when York himself testified, he stated that he worked very long hours; that his wife took care of the pony; that he periodically bought food and put the food in the barn; that he had not seen the pony in over a month; and that nobody told him the pony was in distress. York's evidence was completely uncontroverted. When the totality of the evidence was considered, we held that no reasonable jury could find that York acted recklessly in keeping the pony, and we reversed his conviction for cruelty to animals because the evidence was insufficient to support the verdict.

Appellant's story, on the other hand, is by no means uncontroverted. Appellant said he never slapped Ivy at the party. Sharon Heaton said he did. Appellant's little sister said it was her idea to have appellant take her home. Melissa Hartman said it was appellant's idea. Appellant said he hit Ivy only once in the face and that the other bruises on Ivy's head were caused by a fall. The coroner said the other bruises were probably caused by hand slaps. Appellant had no explanation for Ivy's broken arm. The coroner doubted a young person could suffer that injury by falling and thought a tremendous force broke her bone. Appellant said the injuries to Ivy's throat were caused by a blow. Dr. Ripepi and the coroner said those injuries were probably caused by strangulation. These conflicts in the evidence had to be resolved by the trier of fact, and this is not the kind of case where an acquittal was a foregone conclusion.

At the end of the trial, there was sufficient evidence on the issue whether appellant intended to murder his wife to create a genuine issue for the judge to decide.

The other part of appellant's post-trial motion was made under the second sentence of Crim.R. 33(A)(4), which states:

> "If the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict or finding accordingly, without granting or ordering a new trial, and shall pass sentence on such verdict or finding as modified ***."

The rule does not indicate how a court is to decide whether the evidence "shows" the accused is not guilty of a greater offense. Two possibilities suggest themselves. First, in a situation where the evidence is legally insufficient to sustain a

guilty verdict on the greater offense, the court would be compelled to enter a judgment of acquittal, or not guilty, on the greater offense. See *State v. Robinson* (1954), 161 Ohio St. 213. Second, even if the evidence is technically sufficient to create a triable issue, the court might still harbor a reasonable doubt as to whether the accused is guilty of the greater offense. If the judge has reasonable doubt, again he must enter a judgment of acquittal on the greater offense. In either case, Crim.R. 33(A)(4) gives the court discretion to enter a guilty verdict on a lesser included offense that had been adequately proved in the first trial, or to order a second trial on the lesser included offense.

We read appellant's motion and brief on appeal only to assert that the state's evidence was insufficient as a matter of law to establish that he intended to commit murder, the greater offense. That argument lacks merit. Therefore, appellant presented no valid reason to reduce the verdict or to hold a new trial on a lesser included offense.

For these reasons, we reject the second assignment of error.

In the first assignment of error, appellant argues his trial attorneys were ineffective for failing to file a motion to suppress. We have held that trial counsel must file such a motion only where there was at least a "reasonable possibility" that it could have been granted. *State v. Payton* (1997), 119 Ohio App.3d 694.

The police officers entered the Byerly residence without a warrant and searched the house until they found Ivy's unconscious body in a second-floor bedroom. A warrantless search is presumptively unreasonable. *Katz v. United States* (1967), 389 U.S. 347, 357. If the defendant challenges its constitutionality with a motion to suppress the fruits of the search, the state bears the burden of demonstrating that it falls within one of the exceptions to the warrant requirement. *Xenia v. Wallace* (1988),

37 Ohio St.3d 216, 218.

The obvious theory upon which the state would have attempted to justify the officers' conduct in this case is the so-called "emergency" exception to the warrant requirement. "The right of the police to enter and investigate in an emergency without the accompanying intent to either search or arrest is inherent in the very nature of their duties as peace officers, and derives from the common law. *Read v. Case*, 4 Conn. 166 (1822). *United States v. Barone* (C.A.2, 1964), 330 F.2d 543, 545. In *Mincey v. Arizona* (1978), 437 U.S. 385, 392, the Supreme Court stated:

> We do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid." (Footnotes omitted.)

See, also, *Minnesota v. Olson* (1990), 495 U.S. 91; *Root v. Gauper* (C.A.8, 1971), 438 F.2d 361; *Wayne v. United States* (C.A.D.C. 1963), 318 F.2d 205 (opinion of Burger, J.); *State v. Willoughby* (1992), 81 Ohio App.3d 562; *State v. Cheers* (1992), 79 Ohio App.3d 32; *Parma v. Jackson* (1989), 58 Ohio App.3d 17; *State v. Roach* (1982), 8 Ohio App.3d 42; *State v. Hyde* (1971), 26 Ohio App.2d 32; *State v. Overholser* (July 25, 1997), Clark App. No. 96-CA-0073, unreported, 1997 WL 451473; *State v. Hayes* (Nov. 25, 1992), Cuyahoga App. No. 61396, unreported, 1992 WL 357257; *State v. Morris* (Nov. 29, 1989), Montgomery App. No. 10992, unreported, 1989 WL 145175; *State v. Human* (Feb. 29, 1984), Hamilton App., No. C-830427, unreported, 1994 WL 6769.

One of the responding officers, Deputy Ed Withers, testified that he and the other two officers were dispatched to the Byerly residence to check on the welfare of the occupants. They had a duty to make sure that the people in the house did not need medical assistance or police protection. The least intrusive way they could have fulfilled this duty was by rapping on the doors and talking with the occupants when they answered. That is what all of the officers testified they attempted to do. They rapped "loudly" and repeatedly called out that they were police and for the occupants to open the doors. They got no response. Additionally, there was a dog running loose and barking outside. Although it was late, and the occupants could have been sleeping, it was highly unlikely that people inside did not hear the commotion.[1] The fact that officers got no response after they had been dispatched on a "welfare check" gave them legitimate cause for concern.

Appellant argues that Melissa Hartman did not call 9-1-1, but dialed the seven digit number for the Sheriffs Department. He tries to distinguish this case from other where the police were responding to a true emergency call. *E.g., State v. Applegate*, (1994), 68 Ohio St.3d 348 (officers dispatched on a "Code 2" call regarding domestic violence, which meant "get there priority, as

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1. Appellant testified that he woke up when he heard the dog barking and that he saw the lights from the police cruisers. He claims he did not hear knocking or the police announcing themselves. On cross-examination, appellant offered no good reason as to why he did not go downstairs to find out what was happening. Incredibly, he claimed he fetched a pair of jeans to put on, even though he was already dressed in sweat pants, and when he sat down to pull on the jeans, he fell asleep!

quick as you can, potential danger"). While the nature of the call and the information the caller provides the police dispatcher are certainly relevant considerations bearing on the officer's reasonable belief that a emergency situation existed inside the residence, these are by no means controlling. Other factors might convert a simple "welfare check" into an emergency that requires immediate action.

Another responding officer, Deputy Tim Hudock, testified that when Bill and Donna Cornelius arrived, he identified them and determined why they were present. Donna told him she was Ivy's mother, that Melissa Hartman had called her and told he there had been a 'problem" at the house, and that Melissa also called the police.

Appellant argues that the content of Ivy's call to Melissa disproves there was an ongoing emergency situation because she indicated the fight was over and she did not clearly ask Melissa to call the police. He suggests that we announce a bright-line rule requiring battered women to clearly and unequivocally ask for help before police are allowed to enter a private residence to investigate reports of domestic violence.

Since the record does not establish the officers knew the exact content of Ivy's phone call, or about her ambiguous cry for help, we will disregard this information. Appellant's argument needs no further comment, other than the observation that the Exclusionary Rule was specifically designed to deter police overreaching, and that courts have repeatedly refused to apply the Exclusionary Rule in contexts where it would not have its intended effect. *United States v. Janis* (1976), 428 U.S. 433, 454; *State ex rel. Wright v. Ohio Adult Parole Auth.* (1996), 75 Ohio St.3d 82. The Rule is very badly suited as a tool for other kinds of social engineering. A battered woman has more on her mind than the admissibility of evidence found by police in a

warrantless entry of her home when she is in the middle of a domestic violence incident. We doubt the threat of exclusion will have any effect on her behavior. Additionally, requiring battered women to clearly call for police intervention is unrealistic, because many of these women live in fear of their husbands or significant others. In Ivy's case, she may have been afraid that appellant would retaliate against her if she directly asked Melissa Hartman to call the police, even though she may have been in dire need of protection. It may be up to a perceptive friend in these situations to make the call for help in the battered woman's behalf. We decline to lay down a bright-line rule invalidating warrantless entries on the ground that the perpetrator of domestic violence has successfully paralyzed his victim with fear.

Appellant also argues the fact that Melissa Hartman called the police and that Donna Cornelius "adds nothing" to the officers' assessment that an emergency situation existed because neither woman witnessed the fight--they had only second-hand information to report.

In the context of an informant giving information to police who put that information into an affidavit and apply for a search warrant, the Supreme Court has explained that the basis of the informant's knowledge--whether personal observation or hearsay--is only one factor to be considered among the totality of the circumstances in determining if the affidavit supplies probable cause to issue the warrant. *Illinois v. Gates* (1983), 462 U.S. 213, 234.

By analogy, we conclude that the basis of a caller's information is only one factor that must be considered. The determination of whether the officers had a reasonable suspicion of an emergency situation is to be made on the totality of the circumstances known to them at that time.

We think it more relevant to the officers' assessment of the situation that Donna was Ivy's mother. Obviously, she knew much more about the history of appellant and Ivy's marriage than did the officers, and upon hearing from Melissa Hartman that there had been a fight, Donna and Bill rushed over at two o'clock in the morning. If Ivy's own mother were that concerned for the safety of her daughter, the officers would have been remiss not to have taken her presence at the scene into consideration.

When Donna and Bill verified that appellant's and Ivy's automobiles were there, the officers could have reasonably inferred that the couple was still home. Upon having confirmed they were probably inside, the fact that no one answered became even more suspicious.

When one of the deputies saw a "large male" on the second floor, who behaved abnormally by ignoring the officer when a light was shined upon him, the officers had .even more cause for concern. If a crime had been committed in the house, he might have been in the process of concealing or destroying valuable evidence. It was also possible that the police had interrupted this male suspect while a crime was still in progress.

Appellant cites *State v. Applegate, ~supra,* the syllabus of which states:

> 'Exigent circumstances justify a warrantless entry into a residence by police when police are there pursuant to an emergency call reporting domestic violence and where the officers hear sounds coming from inside the residence which are indicative of violence."

Appellant argues that the police in this case did not hear any sounds of violence coming from inside the Byerly residence. We do not read the *Applegate* syllabus as saying that such sounds are a prerequisite to the validity of a warrantless entry. Where they

happen to exist in a fact pattern, they do provide a powerful justification for immediate action. However, a man cannot beat or strangle his wife and maintain an absolute Fourth Amendment right merely because he did so quietly. Again, the reasonableness of a warrantless entry depends on the totality of the circumstances. That there were no sounds of violence audible from the front porch of the Byerly residence is not determinative of the question whether someone inside was in need of immediate medical attention or police protection.

When Donna Cornelius decided to crawl through the open window on the front porch, the situation changed dramatically. At that point, the police had a report of domestic violence, were sent to check on the welfare of the occupants, had confirmed they were home, but got no response to repeated calls and vociferous knocking, and knew a "large male" who may well have been involved in the violence was awake and roaming the darkened house. Donna was entering the house alone, thereby exposing herself to whatever danger that might have been lurking within. The policemen would have been derelict in their duty to ascertain the well-being of the occupants and to protect the safety of the public if they had stood idly by on the porch while one of them went to get a search warrant.

We reject appellant's argument that Donna Cornelius was an "agent" of the police when she entered the house. Generally, the Fourth Amendment only applies to governmental action, and does not apply to searches undertaken by private individuals. *Burdeau v. McDowell* (1921), 256 U.S. 465, 471; *State v. Grant* (1993), 67 Ohio St.3d 465, 471; *State v. Morris* (1975), 42 Ohio St.2d 307, 316. There is an exception, however, when it can be said the private party was an "instrumentality" or an agent for the state for the purposes of the search. *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 487. But as we explained in *State v. Glavic* (Mar.

27, 1998), Lake App. No. 96-L-135, unreported, at 5 fn.4: "The cases in this area require a great deal of entanglement between the police and the private searcher before agency can be found." In *State v. Bohannon* (Kan.App. 1979), 596 P. 2d 190, 195, the court canvassed the case law and reported that citizens were considered police "agents" where (1) the search was made under the authority or direction of the police, (2) the citizen was actively recruited by the police, (3) the citizen was paid to conduct the search, (4) the police instigated, influenced, or arranged for the individual to make the search, (5) the police encouraged him or actively participated in the search, or (6) the police provided transportation, chose the time of day for the search, and described the item needed to be seized. Here, none of the deputies asked Donna Cornelius to enter the Byerly residence. It was Bill Cornelius' idea to try the window. The commanding officer did not assist Donna; she opened the window herself. Therefore, she acted not as an "agent" for the officers, but as a mother gravely concerned for the welfare of her child.

In a post-hearing brief, appellant argues that the officers letting Donna Cornelius enter the Byerly residence first was inconsistent with the notion that they believed there was an emergency situation. He selectively quotes language out of *State v. Bowe* (1988), 52 Ohio App. 3d 112, 113, where Judge Cacioppo wrote: "the actions of the police allowing civilian passersby to enter the appellants' apartment destroys any argument that this was a situation threatening life or limb."

The rule of a decided case is more than an isolated statement taken from somewhere in the court's analysis. It is the result the court reached on the particular constellation of facts presented therein. If the facts of a reported case are sufficiently analogous to the facts of the case under review, we generally prefer to reach the same result on the principle of *stare decisis*.

In *Bowe,* the police responded to a breaking-and-entering call. Witnesses in the vicinity reported seeing two men and gave the police the license plate number of the getaway car. The officers went to the address of the license plate registrant, a house divided into two apartments. They suspected the burglars were in the upper-floor apartment. They "allowed" a bystander to go up and speak with the burglars. The bystander came out and said the burglars would be right down. When one of them emerged, the officers arrested him. Other officers made a warrantless entry and searched the apartment until they found the other burglar hiding in a closet and holding stolen VCRs. The appellate court reversed the burglars' convictions, holding the VCRs should have been suppressed. In so doing, Judge Cacioppo rejected the state's claim of emergency circumstances with the language previously quoted.

These facts are not sufficiently analogous to those in the case at bar to persuade us to reach the same result as to Ivy's body and the other evidence discovered in the Byerly residence. The police in *Bowe* had no reason to believe that anyone in the hideout was in need of immediate medical assistance. Nor did they have reason to believe that anyone might be in need of police protection. The bystander's entrance under those circumstances was further evidence that there was no emergency. Donna's emphatic insistence to reach her daughter in the house was evidence of the opposite--that something was wrong.

Finally, appellant argues the initial entry was illegal because the officers took twenty minutes to get inside. He says this is inconsistent with the idea that they perceived an emergency situation existed in the house. We do not agree. Appellant's argument assumes the officers must instantly know that the emergency exists inside and in all cases must enter the residence immediately. However, there is no inflexible rule that officers

sent on a "welfare check" must instantaneously force the door open to establish the well-being of the occupants. The deputies in this case did not know all the circumstances when they first arrived. Upon gathering more information and witnessing developing events, they ultimately came to understand the need for entering the house without waiting for a warrant. They acted prudently and reasonably in knocking on the doors and trying to rouse the occupants before going inside.

There is no indication in the record that the officers intended to conduct a warrantless search and used the "emergency" exception as a pretext. There is every indication that they entered solely out of concern for the safety of the occupants of the house.

The "search" of the Byerly residence was no broader than necessary to effectuate the purposes of the entry. From what we understand of the condition of the house, the deputies discovered incriminating objects strewn along the path they took to the second floor bedroom. "[T]he police may seize any evidence that is in plain view during the course of their legitimate emergency activities." *Mincey v. Arizona,* 437 U.S. at 393, citing *Michigan v. Tyler* (1978), 436 U.S. 499.

Appellant also challenges the photographs taken by Deputy Hudock after he made a second warrantless entry at about eight o'clock the next morning. The evidence showed that the commanding officer summoned another deputy to the scene to secure the house from the time Ivy was taken from the hospital forward. This officer kept a log of all persons coming and going from the residence. Police may reenter a residence and collect evidence in plain view even though the emergency situation which justified the initial intrusion has terminated, so long as the second entry is restricted to the scope of the initial invasion. *State v. Sage* (1987), 31 Ohio St.3d 173, 185-186. When the commander and Deputy Hudock made a second warrantless entry

to take pictures, they simply conducted an activity that could have been done during the first warrantless entry.

The overnight presence of the log officer, inside the Byerly residence, did not offend the Constitution. In *Segura v. United States* (1984), 468 U.S. 796, DEA agents had the defendant under surveillance and had abundant cause to believe he was selling drugs out of his New York City apartment. On one occasion, they observed him meet with a buyer at a local restaurant. The defendant gave the buyer a package. Some of the agents followed the buyer and arrested him. They found the package contained cocaine. The buyer cooperated with the agents, admitting that he purchased the cocaine from the defendant. These officers began the process of obtaining a search warrant for the defendant's apartment.

Meanwhile, the agents watching the apartment were instructed to arrest the defendant as soon as he came home. They did so when he entered the lobby area of the apartment building. The agents took the defendant upstairs to his apartment and knocked on his door. A woman, who turned out to be an accomplice, opened it. The agents entered the apartment without a warrant and without permission and arrested the accomplice and other people in the apartment. They "secured" the apartment by stationing two agents inside until the warrant could be processed.

Apparently, there was some problem with getting the warrant request typed. Eighteen hours later, a federal magistrate issued the warrant and other agents came to the apartment to execute it. They discovered large quantities of drugs.

The Supreme Court assumed the "securing" of the apartment constituted a "seizure" of the articles within and held the officers acted reasonably, stating:

> "[A] seizure affects only possessory interests, not

privacy interests. Therefore, the heightened protection we accord privacy interests is simply not implicated where a *seizure* of premises, not a search, is at issue. We hold, therefore, that securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents.

***

"In this case, the agents entered and secured the apartment from within. Arguably, the wiser course would have been to depart immediately and secure the premises from the outside by a 'stakeout' once the security check revealed that no one other than those taken into custody were in the apartment. But the method actually employed does not require a different result under the Fourth Amendment, insofar as the *seizure* is concerned. As the Court of Appeals held, absent exigent circumstances, the entry may have constituted an illegal *search,* or interference with petitioners' privacy interests, requiring suppression of all evidence observed during the entry. Securing of the premises from within, however, was no more an interference with the petitioners' possessory interests in the contents of the apartment than a perimeter 'stakeout.' In other words, the initial entry--legal or not--does not affect the reasonableness of the seizure. Under either method--entry and securing from within or a perimeter stakeout--agents control the apartment pending arrival of the warrant; both an internal securing and a perimeter stakeout interfere to the same extent with the possessory interests of the owners." (Emphasis *sic.) Segura,* 468

U.S. at 810-812.

The Court could not rely on the evidence the agents saw in the apartment when assessing whether they had probable cause to secure it. It relied instead on the untainted information gathered through the surveillance and legitimate arrest of the buyer.

Unlike the agents' actions in *Segura,* the officers in this case had a valid reason to enter the house. Therefore, their observations could validly support their determination that appellant probably committed a serious crime and their decision to secure the crime scene.

"Of course, a seizure reasonable at its inception because [it was] based upon probable cause may become unreasonable as a result of its duration or for other reasons." *Segura,* 468 U.S. at 812. The eighteen hour stay in *Segura* was held to be reasonable. The five or six hour stay in this case was also reasonable.

In domestic violence cases, the property owner's right to privacy in his home must be balanced against a woman's equally important right to life, liberty, and safety. When they are thoroughly examined in light of the competing interests at stake, none of appellant's Fourth Amendment arguments have any substance. Therefore, a motion to suppress did not have a "reasonable possibility" to prevail, and appellant's trial attorneys were not ineffective when they decided not to file one.

The first assignment of error is without merit.

The conviction and sentence for murder are affirmed in all respects.

-S-

JUDGE ROBERT A. NADER

FORD, P.J.,

O'NEILL, J.,

concur

APPENDIX C

STATE OF OHIO	)	IN THE COURT OF APPEALS
COUNTY OF PORTAGE	)	ELEVENTH DISTRICT
STATE OF OHIO, Plaintiff-Appellee, - vs - JOHN G. BYERLY, JR., Defendant-Appellant		JUDMENT ENTRY CASE NO. 97-P-0034

On September 4, 1998, Appellant filed an Application for Reconsideration of this Court's Opinion and Judgment Entry of August 24, 1998.

On September 14, 1998, Appellee filed its Memorandum of Law in opposition to Appellant's Application for Reconsideration.

App.R. 2(A) provides, in part, as follows:

> "Application for reconsideration of any cause or motion submitted on appeal shall be made in writing before the judgment or order of the court has been approved by the court and filed by the court with the clerk for journalization or within ten days after the announcement of the court~'s decision, whichever is the later. ***"

Upon consideration of Appellant's motion, and since it is apparent that Appellant's App.R. 26(A) motion of September 4, 1998 was filed more than ten days from the date of this Court's August 24, 1998 judgment, it is the order of this Court that, pursuant to the time guidelines set forth in App.R. 26(A), Appellant's application for reconsideration is hereby denied.

-s-

JUDGE ROBERT A. NADER

FORD, P.J.,
O'NEILL, J., concur.